United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

75-4020

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FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

DUNKIRK MOTOR INN, INC., d/b/a
HOLIDAY INN OF DUNKIRK-FREDONIA,
Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR RESPONDENT

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Statement of the Case

The Respondent, Dunkirk Motor Inn, Inc., d/b/a Holiday Inn of Dunkirk-Fredonia (hereinafter referred to as the "Company"), believes that the National Labor Relations Board's statement of the issues and statement of the case fairly summarize the posture and background of this proceeding. It should be emphasized, however, that the substance of the within controversy is the Board's findings made in the earlier representation proceeding (Board Case No. 3-RC-5678) conducted under Section 9 of the National Labor Relations Act.

The Board order sought to be enforced herein is based upon findings made in the representation proceeding. The election held in that proceeding resulted in a vote of 20 to 18 in favor of the Amalgamated Meatcutters and Butcher Workmen of North America, Local 34, AFL-CIO (the "Union") (A. 5). Five ballots cast in the election were challenged, three of which remain in issue (A. 5). Following a hearing on the challenged ballots ordered by the Board (A. 57-60), the Hearing Officer found that John Leslie Straight was an employee, and therefore recommended that the Union challenge to his ballot be overruled (A. 64-65). The Hearing Officer further found, however, that Ruth Alice Hancock and Sandra Ann Nichols were supervisors, by reason of which he recommended that the Union challenge to their ballots be sustained (A. 63-64, 65-68).

The Company filed exceptions to the Hearing Officer's report with respect to Hancock and Nichols. The Board panel, with Chairman Miller dissenting as to Hancock, adopted the Hearing Officer's findings and recommendations concerning the challenged ballots (A. 69-74).

The Company believes that Straight, Hancock and Nichols are employees. Accordingly, the challenges to their ballots should be overruled, their ballots counted, and a revised tally issued.

In addition, the Company urged throughout all stages of the proceedings before the Board that the Union's offer to waive initiation fees constituted coercive conduct which interfered with the election (Objection 1). The Acting Regional Director's report recommending that the objection be overruled (A. 55-56) was adopted by the Board (A. 59).

For the foregoing reasons, the Company refused to enter into collective bargaining negotiations with the Union, which culminated in the Board conclusion that the Company violated Section 8(a)(5) and (1) of the Act.

ARGUMENT

POINT I

By reason of its erroneous finding that Hancock and Nichols were supervisors and hence ineligible to vote in the representation election, the Board improperly certified the Union and improperly found that the Company violated Section 8(a)(5) and (1) of the Act.

As indicated above, the Company has declined to bargain with the Union on the ground that the Board certification is invalid. The Board argues that its determinations with respect to the challenged ballots of Ruth Hancock and Sandra Nichols were proper and should not be disturbed by the Court in this appeal.

The test is whether substantial evidence exists to support the Board's conclusions. In *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, it was said:

> ". . . [A] reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

As this Court has recognized in *N.L.R.B. v. Getlan Iron Works, Inc.*, 377 F.2d 894, 898 (C.A. 2, 1967), for example,

quoting from *Universal Camera*, "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." (340 U.S. at 488)

It should be pointed out that cases like *N.L.R.B. v. Olson Bodies, Inc.*, 420 F.2d 1187 (C.A. 2, 1970), cert. den. 401 U. S. 954 (cited by the Board at page 7 of its Brief) are not applicable to the issues presented by challenged ballots. This Court, in *Olson Bodies*, was responding to the objection to an election for the Board's failure to arrange for absentee or home voting.

Similarly inapplicable is *Shoreline Enterprises of America, Inc. v. N.L.R.B.*, 262 F.2d 933, 942 (C.A. 5, 1959), cited by the Board (page 7 of the Board's Brief), where the issue was the fairness of the election.

The issues presented to the Court by the challenged ballots are of a different variety. "*Universal Camera* is still the law. It continues to impose upon Courts of Appeals the 'obligation to make an independent review of the whole record'." *Herb Stein, Inc. v. N.L.R.B.*, 368 F.2d 556, 557 (C.A. 6, 1966).

With respect to the question of whether Ruth Hancock and Sandra Nichols are supervisors, the issues presented are purely factual. As stated in *N.L.R.B. v. Lewisburg Chair & Furn. Co.*, 230 F.2d 155, 155 (C.A. 3, 1956):

> "There is no new point of law in this case. The questions involved are fact questions only. That does not relieve us of responsibility for examination of the record and an appraisal of the arguments made both for enforcement and setting aside."

A. Ruth Hancock

In its simplest terms the issue of Ruth Hancock's supervisory status is a matter of transition involving three separate time periods. The first time phase involves employment in a Holiday Inn housekeeping department with a staff of not more than 10 maids and a supervisor. The supervisor is transferred to another location and begins the training of a replacement before her departure. The second phase is the period of the supervisor's absence and presents a somewhat cloudy picture with respect to the identities of the persons performing various roles and job functions in the housekeeping department. The third and most critical time period is subsequent to the supervisor's return, with the ensuing union vote and the issue of Hancock's status.

In support of its determination that Hancock was a supervisor, the Board majority puts great emphasis on her duties and responsibilities during the absence from the Company's inn of Housekeeper Leola Fitzpatrick. The majority sees little difference between Hancock's job during that time period and the period following Fitzpatrick's return to the inn. The Company urges that whatever duties Hancock may have assumed during the absence of Fitzpatrick, the acknowledged supervisor, Hancock reverted to bargaining unit status upon Fitzpatrick's return. Because of the importance of these transitions, they are treated in detail below.

The Housekeeping Department in General.

Responsibility for management of the Company's inn generally is in the hands of the innkeeper, Ken King, and his assistants (A. 82-83). Housekeeping supervision is provided by the housekeeper, Leola Fitzpatrick, who has

been at the inn since February 1973 (A. 83-84). She is charged with overall housekeeping responsibility (A. 83-84) and reports to the innkeeper and his assistants (A. 88). The inn's housekeeping department never employed more than 10 maids (A. 178-179).

Each day the housekeeper receives a report from the front desk which indicates the rooms that have to be cleaned (A. 108-109, 170-171). The maids have been pre-assigned to particular areas or sections of the inn and simply proceed to clean and supply the rooms in their sections (A. 87, 172). As rooms are cleaned, reports so indicating are submitted to the front desk (A. 172-173). A room is not reported ready for occupancy until it has been inspected for cleanliness and supplies (A. 173).

The Selection of Hancock as Assistant Housekeeper.

Fitzpatrick helped to open the Company's inn in Dunkirk, New York, and recruited the initial staff of maids, including Hancock (A. 98, 166-167, 202). In late 1971 or early 1972, Fitzpatrick was directed to report to another inn (A. 98-99, 168). Prior to leaving, she endeavored to find a maid who could ultimately take her place (A. 106, 202-203). Hancock was selected, and about one month before Fitzpatrick's departure, Hancock became an assistant (A. 106, 107, 167). Since Hancock was new to housekeeping, Fitzpatrick regarded her as a trainee and arranged for relatively constant communication with the inn and Hancock during Fitzpatrick's absence (A. 168).

During the period before Fitzpatrick left the inn, Hancock's job did not change materially (A. 107). She assisted Fitzpatrick in determining the used and unused rooms, reporting that information to the front desk (A. 107), and checked cleaned rooms for cleanliness and sup-

plies (A. 107-108). Hancock continued to clean rooms, although to a reduced degree (A. 108), and continued to receive the same compensation as the other maids (A. 108). She was not directly involved in hiring or firing during this period, although she occasionally sat in on the interviews with Fitzpatrick to learn how the work was explained to applicants (A. 205).

Fitzpatrick's Departure from the Inn.

When Fitzpatrick left the inn, she informed Hancock that she would be acting housekeeper in Fitzpatrick's absence (A. 204). In Fitzpatrick's thirteen-month absence (A. 115), Hancock assumed some of Fitzpatrick's responsibilities (A. 99). Her compensation was changed from the hourly rate of $1.85 paid to maids to $80.00 per week for a 40-42 hour week (A. 109, 219). At King's instructions, Hancock worked very closely with King and reported to him or his assistants each day (A. 99, 222, 249-250). They spent as much as an hour and a quarter daily (A. 112) discussing personnel and supply problems as well as very minor difficulties (A. 113-114). Hancock maintained weekly telephone contact with Fitzpatrick (A. 100, 168, 189, 200, 213), who, in addition, made several trips to the inn in November 1972 and earlier, and discussed housekeeping operations with Hancock (A. 169, 213).

Hancock picked up the reports from the front desk each day and noted the rooms to be cleaned (A. 205). The maids had been assigned by Fitzpatrick, so they attended to the rooms in their particular sections (A. 205). Since all areas or sections were essentially the same, there was no concern as to preferential assignment (A. 116). Scheduling of maids was performed by Hancock and King together (A. 115). Fitzpatrick's purchasing responsibilities were as-

sumed by King (A. 186). Information as to a maid's preference for vacation was gathered by Hancock and given to King, who then made the schedule (A. 115-116, 219-220). If housekeeping became unexpectedly shorthanded, Hancock resolved the problem with existing personnel or by requesting off-duty employees to report (A. 206). Hancock never exercised any disciplinary authority with respect to a maid who neglected to report for work or one who declined to cover for such a maid (A. 206). In her own words, she didn't have the "authority" (A. 206).

Hancock did not engage in hiring or firing on her own (A. 186). Hancock interviewed candidates for employment and made recommendations to King which he normally accepted (A. 114). Her hiring involvement consisted of apprising an applicant of the objectionable nature of the work and learning whether the applicant still wanted the job (A. 186-187). New hires were then assigned to work with more experienced maids, who would make an assessment of the new maid's performance (A. 188).

During Fitzpatrick's absence, approximately 10 new maids were hired (A. 210-211), some of whom Hancock talked with before hiring (A. 211) to determine if there were babysitting, telephone, or transportation problems, but most importantly to determine whether the applicant was still interested in the rather disagreeable work (A. 211). In all events, Hancock then reported to King, and, significantly, would inform the applicant that her hiring was up to King (A. 212). With one exception not relevant to this discussion (A. 227-228), there were no layoffs or terminations during Fitzpatrick's absence, although with the seasonal reduction in work load, some maids drifted off to other employment (A. 214-215).

Hancock regularly assisted other maids in completing their own sections (A. 208, 228), and cleaned entire rooms from start to finish, often cleaning a whole section of 14 rooms (A. 207-208). Likewise, in the event of a maid's illness, or in the case of guest demands, Hancock, herself, would proceed to clean rooms (A. 208-209). If, in her inspection of cleaned rooms, Hancock discovered an inadequately cleaned room, she would complete it herself, or in the case of persistent failure, would speak to the maid (A. 209-210).

Fitzpatrick's Return to the Inn.

After Hancock had occupied the job for several months, difficulties developed in the housekeeping department which occasioned Fitzpatrick's return to the inn in February 1973 (A. 99-100, 110, 169). Fitzpatrick assumed her position as housekeeper and Hancock became her assistant (A. 100, 169). This was the situation to the date of the election in May 1973 and thereafter (A. 169).

There was no written communication to employees when Fitzpatrick returned (A. 110, 121). In King's words, as echoed by every other witness who offered testimony about the matter, "There was no need to state anything to the employees as to Mrs. Hancock's position" (A. 110). Hancock testified to the same effect, that is, that Fitzpatrick became the housekeeper again; no one had to be told (A. 215).

Hancock reverted to her position as assistant housekeeper (A. 120), but without a pay cut (A. 120). Fitzpatrick held a meeting with the maids immediately upon her return, telling them that she was back at the inn as housekeeper to straighten things out (A. 190, 215, 231, 246). She further informed the maids that if they had any problems

they should see Kitzpatrick first (A. 198). In Hancock's words, Fitzpatrick said ". . . she [Fitzpatrick] was back to take over the department" (A. 231).

Fitzpatrick attended fully to the management of the housekeeping department, assuming the inspection function, overseeing the painting of rooms, hiring personnel, handling personnel problems, etc. (A. 182-183, 233, 235). She has authority to hire, and after consultation with the innkeeper, effectively recommends termination (A. 101, 175). Hancock has no authority in either area (A. 101, 175, 179). For recurring problems with maid work habits, Hancock takes no disciplinary action, but reports to Fitzpatrick (A. 179, 238). Similarly, Hancock does not attend staff meetings (A. 240).

After Fitzpatrick's return, Hancock became less involved with scheduling and inspecting (A. 120, 215, 216). The inspection process, it should be noted, is not limited to Hancock, but is performed by other maids as well (A. 179-180). Hancock covered Fitzpatrick's job on the latter's day off (A. 122), but Fitzpatrick worked six and sometimes seven days a week (A. 122). Fitzpatrick lived at the inn and was readily accessible (A. 236).

Since February 1973, if inspection revealed that a room needed additional work, Hancock, as part of her inspection process, and in addition to cleaning rooms herself from beginning to end, proceeded to clean or supply the room (A. 174, 177, 179, 218, 247-248). Fitzpatrick, on the other hand, never cleaned rooms or made beds; rather, she called the maid back to the room and directed her to take appropriate corrective action (A. 173-174, 177, 216, 247-248). Fitzpatrick often directed Hancock to complete the cleaning of an improperly cleaned room (A. 216, 218), and regu-

larly gave orders to Hancock in the company of other maids, or directly to other maids in Hancock's presence (A. 181, 194).

Hancock's role in the hiring or interviewing process is limited to informing applicants of the disagreeable nature of the job and making inquiry as to the candidate's transportation and babysitting arrangements (A. 175-176).

Hancock's day-to-day maid's work became considerable upon Fitzpatrick's return (A. 120, 215-216). Fitzpatrick testified that Hancock made quite a few beds each day, and on an average, performed maid's work for three-quarters of her day (A. 192-193), often doing particular areas of cleaning, such as bathtub strips and tile, in a whole section of rooms (A. 193). Hancock estimated that she cleaned approximately four rooms each day from start to finish and performed corrective cleaning in another twelve rooms each day (A. 253-254). Fitzpatrick indicated that Hancock had made beds in three of a particular maid's rooms on the day preceding the hearing, and that on other occasions ". . . she hops all over and does rooms. She'll make beds for each and every girl." (A. 193).

Significantly, Hancock often takes rooms which involve harder work than normally required, such as rooms damaged by fire (A. 177). Hancock described at length the vomit and other filth which she, rather than the regularly-assigned maid, is required to clean, occurrences which develop from 10 to 20 times each year (A. 216-217).

Fitzpatrick receives a salary of $150.00 per week (A. 170). Along with other supervisors, she receives life and major medical insurances not provided to bargaining unit employees (A. 84-85, 170), including Hancock (A. 85, 219). In addition, Fitzpatrick receives compensation in the form

of room and board, which is received by no one else in the housekeeping department (A. 170, 219).

Hancock, including the period of Fitzpatrick's absence, wears a maid's uniform, while Fitzpatrick dresses in ordinary street clothes (A. 177, 219, 228). Hancock receives no benefits not provided the maids, and as the other maids are required to do, signs in and out each day (A. 199). Unlike the maids, however, she receives no overtime (A. 199, 219). Since the maids work from 30 to 44 hours per week in the busy season, with time and one-half, other maids would earn as much or more than Hancock (A. 238).

Fitzpatrick is an employee of Federated Home and Mortgage Company, Inc., the owner of the inn, and is responsible to the innkeeper at the particular inn to which she is assigned, who in turn is responsible to Anthony Degleris, Federated's Vice President of Operations (A. 185, 258). Degleris testified, as did Fitzpatrick, that Fitzpatrick's assignment to Dunkirk was on a permanent basis and that there was no intention to re-assign her to another inn (A. 183, 259).

At peak periods, the inn has 10 maids working, and four additional maids to cover days off (A. 178-179). Through the period of the election in May 1973, there were 8 to 10 maids working on a given day (301 Tr. 22 to 302 Tr. 12; 303 Tr. 14-22).[1]

Employee Attitudes.

It is significant that the only witness called by the Union to testify with respect to housekeeping supported the Company's position as to Hancock's bargaining unit status. Dorothy Zielinski, who at the time of the hearings was no

[1] Original transcript.

longer employed at the inn (A. 343), was called as the Union's witness.

Zielinski testified that for the entire two-year period in which she worked at the inn, she worked in the same section with the same set of rooms (A. 344-345), thus supportive of other testimony that there was little or no scheduling involved in housekeeping. Zielinski testified that, since there were no preferential work stations, maid assignment or reassignment was never raised (A. 350). Zielinski was also asked about scheduling in the event of absences, in response to which she indicated that the maids covered the situation themselves with no involvement from either Fitzpatrick or Hancock (A. 349).

Zielinski never received directions from Hancock as to work performance, receiving only Hancock's advice with respect to items of supply not properly left in a room (A. 345).

According to Zielinski, new maids were assigned to more experienced employees for training (A. 355), with the more experienced maids having as much to do with training as Hancock (A. 356).

In the event of illness, Zielinski testified that she called the inn to report, but spoke with whomever answered the telephone, indicative of the employee attitude that Hancock enjoyed no greater prerogative in this connection than any other maid (A. 345-346).

The Board believes Hancock to have interviewed and hired or effectively recommended hiring maids for employment in Fitzpatrick's absence. However, no witnesses so testified, although the Union called a parade of witnesses to testify with respect to Nichols' alleged involvement in

hiring. Zielinski, the only witness called by the Union to testify with respect to houeskeeping, testified that she had never witnessed any interview by either Fitzpatrick or Hancock (A. 347).

Concerning Fitzpatrick's departure from the inn, Zielinski testified that the maids were not informed that Hancock was replacing Fitzpatrick (A. 345, 350). This testimony undermines the Board's emphasis upon the failure of the maids to be expressly informed of Hancock's demotion upon Fitzpatrick's return. It must be remembered that housekeeping was a small department, not more than 10 maids on a given day. Formal communication of Hancock's demotion was not required. As stated by Zielinski: "I found her [Mrs. Hancock] a maid just like myself because she started with me." (A. 351).

With reference to the meeting held with the maids upon Fitzpatrick's return, Zielinski supported the testimony offered by both Fitzpatrick and Hancock, that is, that Fitzpatrick was back at the inn to straighten out its problems (A. 352-353). Zielinski testified that Fitzpatrick informed the maids that any problems were to be taken up with Fitzpatrick (A. 353). In Zielinski's words: "She was my boss, and that is who I went to." (A. 353).

Providing further insight of employee attitudes was Zielinski's testimony of how she knew the reason for Fitzpatrick's return, that is: "Because Mrs. Fitzpatrick was always there when there was trouble around the maids, she was there." (A. 358). Zielinski testified that since Fitzpatrick's return, job-related problems were discussed with Fitzpatrick and that the same was true with respect to instructions, inspections, mistakes and omissions (A. 363).

Summary.

In holding Hancock to be a supervisor, the Board argues that after Fitzpatrick's return to the inn, Hancock shared supervisory authority with her. The record, however, although perhaps supportive of a finding that Hancock had limited supervisory authority while Fitzpatrick was away, does not support the conclusion that Hancock retained any of that authority when Fitzpatrick returned.

With respect to hiring, Hancock's testimony indicated that her authority was limited to occasionally sitting in on interviews, and if Fitzpatrick was called away, to make the applicant feel at ease (A. 216, 240). Throughout her testimony, Hancock responded that since Fitzpatrick's return, Hancock had *not,* on her own initiative, informed applicants to report for work (A. 244). Her testimony, consistent with that earlier given, was that "under Mrs. Fitzpatrick's orders I have asked the girl to come to work" (A. 244). When pressed on cross examination about a narrow portion of her statement to the Board agent, she acknowledged that she "told" employees to report for work, which, of course, she had. But—in the context of her testimony—she did so at the direction of Fitzpatrick.

Even assuming Hancock had hiring or recommending authority in Fitzpatrick's absence, in light of Fitzpatrick's return and her remarks to the maids, the conclusion that Hancock retained such authority would have to be supported by some proof, if not specific actual examples, none of which forms a part of this record. The fact that an employee may make recommendations with respect to applicants or existing personnel has no probative value without some showing that the recommendations were effective in some particular instance. *Santa Fe Trail Transportation Co.,* 119 NLRB No. 154, 1957-58 CCH NLRB ¶ 55,112

(1958). At best, whatever opinions or recommendations Hancock expressed subsequent to Fitzpatrick's return were the subject of independent review and judgment by others, and therefore insufficient to establish her as a supervisor. See, for example, *Diana Shops of Washington State, Inc.*, 170 NLRB No. 54, 1968-1 CCH NLRB ¶ 22,288, wherein it was held that a single instance of having effectively recommended the hiring of an applicant was insufficient to infer that the employee had supervisory status.

Citation of *Howard Johnson Company*, 201 NLRB No. 52, 1973 CCH NLRB ¶ 24,989 (page 16 of the Brief) by the Board is difficult to understand. It appears that the determinative factor in that case was the holding out of the employee as a supervisor. There is no indication that anything of the sort occurred with reference to Hancock. The testimony shows that by the design of the innkeeper, as well as Hancock's own anxiety about the job, Fitzpatrick's departure caused only a minimal assumption of prerogatives on Hancock's part. She looked to King in all matters and relied upon her constant telephone contact with Fitzpatrick. When Fitzpatrick returned, she straightway called a meeting of the maids to tell them what they already knew, that notwithstanding Hancock's authority while Fitzpatrick was gone, Fitzpatrick was back in charge.

In rejecting the Board's inclusion of employees in a bargaining unit, the Court in *Arizona Public Service Company v. N.L.R.B.*, 453 F.2d 228 (C.A. 9, 1971) found such employees to be supervisors and not properly in the unit by examining in part the attitudes of both the employer and other employees. The Court was at least partially guided by the clear indication that the Company and the other employees considered the men supervisors. The reverse, of course, is true with respect to Hancock. Neither the

Company nor her co-workers considered her to be a supervisor.

The fact that since Fitzpatrick's return Hancock acted in Fitzpatrick's place in her absence, by itself is not indicative of supervisory status. The bargaining unit employee must exercise some of the other prerogatives of supervision during the relevant period. *Factory Mutual Engineering Corporation,* 166 NLRB No. 49, 1967 CCH NLRB ¶ 21,619; *Stewart & Stevenson Services, Inc.,* 164 NLRB No. 100, 1967 CCH NLRB ¶ 21,368; *Pacific Drive-In Theaters Corp.,* 167 NLRB No. 88, 1968-1 CCH NLRB ¶ 21,801; *Marlene Industries Corp.,* 171 NLRB No. 118, 1968-1 CCH NLRB ¶ 22,528; *G. Fox & Co., Inc.,* 155 NLRB No. 78, 1966 CCH NLRB ¶ 20,032; *Green Brothers Lumber Corp.,* 158 NLRB No. 152, 1966 CCH NLRB ¶ 20,460.

As indicated in *Pulley d/b/a Capitol-Varsity Cleaning Co. v. N.L.R.B.,* 395 F.2d 870 (C.A. 6, 1968), the extent to which the employee assumes the supervisor's responsibilities is determinative of the employee's status. Here, there is no indication that since February 1973 Hancock engaged in anything more than the expected routine during Fitzpatrick's absences. It should be recalled that Fitzpatrick lived at the inn, and, in Hancock's words, was "easy" to consult if problems arose (A. 236). Such things as attendance at managerial meetings, Hancock's replacement of Fitzpatrick in the latter's absence, and Hancock's informal title of assistant housekeeper are to be rejected, where the evidence indicates that the supposed supervisor merely carries out the instructions of management or carries its message to other employees. See, for example, *N.L.R.B. v. Sayers Printing Company,* 453 F.2d 810 (C.A. 8, 1971).

The testimony established that the vestigial supervisory authority seen by the Board disappeared when Fitzpatrick returned. In this regard, the analysis in *Oil, Chemical and Atomic Workers Int. Union v. N.L.R.B.*, 445 F.2d 237 (C.A. D.C., 1971), cert. den. 404 U.S. 1039, is helpful. The Trial Examiner found, and the Board approved, that employees were not supervisors, notwithstanding evidence submitted by the employer which tended to show a "conferral" of such authority. The Court summarized and endorsed the Trial Examiner's conclusions as follows:

> "The thrust of his conclusion is that, while numerous allegations of supervisory authority have been made, the nearly total lack of evidence of authority actually exercised negates its existence." (445 F.2d at 244)

Thus, in the present case, for example, the Board asserts that Hancock supervised the maids' work, but ignores the fact that she displayed no authority to have other maids clean the worst rooms; the Board asserts that Hancock had authority to grant time off, but ignores the fact that she had no authority to do anything beyond acquiesce.

Every witness who even mentioned the topic remarked that they knew the impact of Fitzpatrick's return, without the assistance of written communication. Board cases establish that employees who have been relieved of supervisory status and relegated to the status of regular employees are to be included in the bargaining unit. *Sealtest Southern Dairies,* 121 NLRB No. 161, 1958 CCH NLRB ¶ 55,777. Interestingly, it was so held by *Sealtest* even though the demoted employee retained authority to recommend discharge, when that authority was subject to a supervisor's personal independent judgment. *The Ryan Aeronautical Co.,* 132 NLRB No. 125, 1961 CCH NLRB ¶ 10,273, is closely analogous to the instant case. There, an em-

ployee who had had supervisory authority, but who at the time of the election was working in an advisory capacity with no supervisory function, was held no longer to be a supervisor, since the employer (as in the case here with Hancock) had no plan to restore him to his former position.

See, also, *Gellman Manufacturing Co.*, 87 NLRB No. 41, 1949-50 CCH NLRB ¶ 9,428, holding that since the potential restoration of employees to their former supervisory status was remote and speculative, such employees should be included in the bargaining unit. In *Henriksen, Inc.*, 191 NLRB No. 80, 1971 CCH NLRB ¶ 23,233, it was held that, even though an employee was considered for management training by the employer and had limited authority to approve customer checks, since he had no other authority regular employees did not have, he was not a supervisor.

In this connection, the Board has lost sight of the size of the inn's housekeeping staff. At its largest, there were only ten maids to supervise, hardly a large enough force to require the supervision of someone in addition to Fitzpatrick. Board precedent establishes that the relative number of employees and supervisors is a factor to be considered in determining supervisory status of individuals. *Weather Seal, Inc.*, 161 NLRB No. 105, 1967 CCH NLRB ¶ 20,895; *Swan Super Cleaners, Inc.*, 152 NLRB No. 13, 1965 CCH NLRB ¶ 9285, enf'd. 56 LC ¶ 12,239, 384 F.2d 609 (C.A. 6, 1967); *Plastics Industrial Products, Inc.*, 139 NLRB No. 90, 1962 CCH NLRB ¶ 11,790; *Applied Research, Inc.*, 138 NLRB No. 109, 1962 CCH NLRB ¶ 11,661.

In summary, after Fitzpatrick's return, Hancock, notwithstanding the title of "assistant housekeeper", worked as a maid, or at best a leadwoman. The authority which was left to her was routine and not supervisory. *Pueblo*

Supermarkets, Inc., 156 NLRB No. 65, 1966 CCH NLRB ¶ 20,139. Her status was close to that of the inspectresses discussed in *Arlington Hotel Co., Inc.*, 126 NLRB No. 51, 1960 CCH NLRB ¶ 8538, employees whom the Board found not to have been supervisors, since their jobs were limited to checking rooms to determine if they had been properly prepared for guests, failing which, defects would be reported to the housekeeper. They operated under the housekeeper's supervision and the housekeeper determined if any disciplinary action was to be taken. Hancock's job is not dissimilar, except that if she discovers defects in a prepared room, she herself has to attend to the required corrective work.

By reason of the above, therefore, and upon the analysis of Chairman Miller in his dissenting opinion (A. 74-77), it is urged that the record does not sustain the Board's finding that Hancock was a supervisor.

B. Sandra Nichols

The Hearing Officer in the representation proceedings before the Board, found that Sandra Nichols, a hostess-cashier, interviewed applicants for waitress jobs at the inn and told them to report for work without first clearing the hirings with the innkeeper (A. 63-64). The Hearing Officer accordingly recommended that Nichols be found to have been a supervisor. The Board approved the Hearing Officer's report without comment as to Nichols (A. 71-72). Since the Hearing Officer's conclusion and the Board's approval thereof were predicated upon Nichols' interviewing and hiring involvement, the question of Nichols' supervisory status would seem to depend solely on that issue.

The Company acknowledges that Nichols was involved in the interviewing process, but urges that the nature of the

inn and the similar involvement of numerous other bargaining unit employees make reliance on Nichols' involvement highly inappropriate.

Although it is the practice of the innkeeper to talk with employees before they are hired, he acknowledged that many people were hired on the recommendation of other employees (A. 148-149). King indicated that about a dozen employees were hired on Nichols' recommendation and that he may not have talked with all of them before they were hired (A. 153). He did talk with some of them before the commencement of their employment (A. 153). Numerous employees, however, were hired on the recommendation of other employees clearly in the bargaining unit (A. 153-156, 158-162). For example, a dishwasher was hired on the recommendation of a waitress (A. 153); a busboy was hired on the recommendation of his brother, another busboy (A. 154). Indeed, John Straight (the bartender whose ballot was challenged) was employed upon the recommendation of another employee without having been interviewed by anyone in the inn's supervision (187 Tr. 22 to 188 Tr. 22).[2]

The Hearing Officer's recommendation that Nichols be found to have been a supervisor is based on two findings: (1) that Nichols interviewed prospective waitresses Pat Rose and Mary Stroble and told them to report for work without clearance by the innkeeper; and (2) that in at least 12 instances Nichols effectively recommended the hiring of prospective waitresses (A. 64).

With respect to the hiring of Rose, the record shows that she was hired to fill a 5:30 A.M. time slot, a period difficult to fill (A. 274), and started two days after her

[2] Original transcript.

interview, replacing a girl who left that very day (A. 275). Thus, virtually any applicant would have been acceptable. Moreover, Rose testified that on the day she first talked with Nichols, she met and briefly chatted with King (A. 274-275), a procedure which, although brief, was characteristic of many hirings at the inn. Rose was hired on the recommendation of her sister-in-law, then employed at the inn, a practice which, according to Rose's own testimony, was common (A. 275).

Similarly, although she appeared not to have discussed her employment at length with anyone except Nichols, Stroble did receive an employment application from, and talked briefly with an assistant manager at the inn, before she met and talked with Nichols three weeks later (A. 294).

The Company does not challenge the Hearing Officer's finding and Board affirmance that Nichols effectively recommended the hiring of prospective waitresses on at least 12 occasions (which apparently include Rose and Stroble). However, it is urged that the hiring of Rose and Stroble, allegedly done by Nichols, as well as the hiring of the prospective waitresses whom Nichols recommended, was characteristic of the manner in which the inn functioned, with *all* employees effectively recommending friends and relatives for employment, often with little or no supervisory involvement, except for the possible exchange of a brief greeting with the innkeeper or his assistant. King described the extremely informal practice at the inn with respect to interviewing and hiring, involving, in addition to Nichols, whatever hostess-cashier or waitress might be on duty (A. 93-95). In all events, however, King conducted an investigation, occasionally summarily, and indicated that no hostess-cashier had the authority on her own initiative to hire a waitress (A. 95).

The ability to effectively recommend the employment of applicants in this context, therefore, has no probative value. In this sense, each employee acts as a recruiter. See, for example, *Great Northern Paper Company*, 171 NLRB No. 120, 1968-1 CCH NLRB ¶ 22,519, wherein owner-operators of tractors and horses used in a commercial logging operation and who recruited crews were not supervisors, since they were only one source of recruitment and the definitive authority to hire and fire was vested in foremen.

Nichols' testimony made it clear that hers was not the last word with respect to hiring. She testified that she would turn over to King the employment applications given her by prospective waitresses and would offer comments and recommendations to King, who *not always* followed her recommendations (A. 317-318). The only estimate in the record is Nichols' testimony that about half the prospective waitresses she *interviewed* were hired, but there is no testimony with respect to how many of those she *recommended* were hired (A. 335). It is conceded, however, that King testified that he generally followed Nichols' recommendations, doing so in about 12 instances (A. 128).

Even with respect to the applicants *interviewed* by Nichols, however, she testified that many were subsequently interviewed by King or an assistant innkeeper (A. 335-336, 339). It appears, therefore, that Nichols' recommendations were sometimes rejected, and that, in any event, an independent investigation was made of the recommendations by King or his assistant. Nichols should be found not to have been a supervisor. *Diana Shops of Washington State, Inc.*, 170 NLRB No. 54, 1968-1 CCH NLRB ¶ 22,288; *Traveleze Trailer Co.*, 163 NLRB No. 43, 1967 CCH NLRB ¶ 21,157.

POINT II

By reason of its erroneous overruling of the Company's objection one to the representation election, the Board improperly certified the Union and improperly found that the Company violated Section 8(a)(5) and (1) of the Act.

In the period preceding the election, Union representatives told employees in a meeting that those persons presently employed would not have to pay initiation fees (A. 55-56). In a letter to employees dated May 8, 1973, the Union stated "there is no initiation fee for those employees presently employed and no dues are paid until a contract has been proposed by yourself and ratified by yourself" (A. 56). These offers made immediately prior to election day obviously contemplated at least some acceptances before the voting and implied the conditions subsequent of a pro-union vote.

The Company urges that it was the intent of these Union statements to solicit support for the Union *in the pre-election period* by enticing as many employees as possible into present membership in the Union. If this had not been the intent, there would have been no need to go on with the statement in the May 8th letter that no dues would be paid until a contract was proposed and ratified, for in no event would dues become payable until the employee had joined the Union. By soliciting maximum pre-election membership on the eve of voting with an offer to waive initiation fees, the Union, in effect, was buying endorsements and support. It is this form of election conduct which the Supreme Court in *N.L.R.B. v. Savair Mfg. Co.*, 414 U.S. 270, 94 S. Ct. 495 (1973), condemned as upsetting the delicate laboratory conditions required for a fair election and for

the preservation of the neutrality of the Act in the election context.

It is urged that the offer of the Union to waive initiation fees in this case, although not within the specific holding of *Savair*, because it was not *expressly* conditioned upon application for membership before the election, was so conditioned by implication and, accordingly, was an improper influence on free choice in the election. Any employee who might be unsure of the outcome of a representation election would be strongly compelled by such an offer to go on record with the Union that he or she had applied for membership *prior* to the vote. If the Union won, the employee would be registered with the winner before the outcome was determined and would be guaranteed initiation-free entry into the Union.

The Company further urges the Court to consider the Union's offer of such an economic benefit on the same terms and under the same standard as it might measure a similar offer of economic benefit by the employer. Numerous cases establish that an employer's offer or promise of economic benefit is an improper interference with the free choice so necessary for a fair election, even when the employer does not expressly condition the offer of economic benefit upon a favorable election vote. Such was the case in *N.L.R.B. v. Exchange Parts Company*, 75 U.S. 405, 409 (1964), where the Supreme Court observed:

> "We have no doubt that it prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect."

The Board and the courts have held that the giving of a benefit or the promise of the same by the employer in the pre-election period is, in and of itself, interference with the election process and the basis for setting aside the election. There is no justification for a different test for the Union. It is reasonable to anticipate a favorable vote from employees who are enticed to join the Union in this pre-election period. The *quid pro quo* the Union expected for the offer on the eve of voting is visible support and a favorable vote in the balloting. In this particular situation, the Union went one more step to add to its offer of economic benefit and assured employees that they would not have to pay dues until a "contract has been proposed by yourself and ratified by yourself". This could be a very substantial economic benefit to employees if the contract were not fully negotiated and ratified for a long period. The Supreme Court's language in the *Savair* case best summarizes the Company's position:

> "Any procedure requiring a 'fair' election must honor the rights of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice." (94 S. Ct. at 499)

Conclusion

For the foregoing reasons, the Board's order should be reversed and its petition to enforce should be denied.

Respectfully submitted,

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Dated: Buffalo, New York, May 15, 1975.

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: N. L. R. B.
v
Dunkirk Motor Inn, Inc. etc.
Docket No. 75-4020

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 19 day of May, 1975 I mailed 3 copies of a printed Brief in the above case, in a sealed, postpaid wrapper, to:

National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Room 910
N.L.R.B. Building
Washington, D.C. 20570

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at AIR MAIL about 4:00 P.M. on said date at the request of:

John B. Drenning, Esq.
2300 Two Main Place, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

19 day of May, 1975

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 77